No. 10,290

United States Circuit Court of Appeals for the Ninth Circuit

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLEE'S BRIEF

THOMAS O. CRAVEN,
United States Attorney.

BRUCE R. THOMPSON,
Ass't. United States Attorney.

WM. J. KANE,
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CITATIONS

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STATEMENT OF THE CASE

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, the appellant, and EDGAR L. NOBLE were indicted in the United States District Court for the District of Nevada on September 2, 1942 (R. 2-5). The first Count of the indictment charged that appellant, John William Westenrider on June 14, 1942, at Carson City, Nevada, did wilfully, knowingly and feloniously, with the intent to defraud one Elizabeth E. Lund, falsely assume and pretend to be an officer or employee acting under the authority of the United States, to-wit: a government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations, and in such pretended character did obtain from said Elizabeth E. Lund a check to the order of

Edgar L. Noble for One Hundred Sixty-Seven Dollars ($167.00) R. 2-3). The second count of the indictment charged appellant, John William Westenrider and Edgar L. Noble with a conspiracy to commit the offense described in the first count; and as overt acts in furtherance of the conspiracy charged that: (1) on or about June 14, 1942, appellant and Edgar L. Noble accompanied one another in an automobile to 204 South Division Street, Carson City, Nevada; (2) on said day appellant falsely assumed and pretended to be a government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations; (3) on or about June 15, 1942, appellant demanded that Elizabeth E. Lund deliver to Edgar L. Noble a check drawn by Elizabeth E. Lund to the order of Edgar L. Noble in the sum of One Hundred Sixty-Seven Dollars ($167.00); (4) that on said day appellant and Edgar L. Noble transferred said check to one F. W. Buchanan, and received money and credits in return therefor. (R. 3-5).

Defendant, Edgar L. Noble, pleaded guilty to the second count of the indictment (R. 51). Appellant, John William Westenrider, pleaded not guilty to both counts of the indictment on September 12, 1942 (R. 6). Appellant was tried before a jury on September 29 and 30, 1942 (R. 7-11). The jury returned a verdict of guilty on both counts of the indictment (R. 11). On October 6, 1942, appellant was sentenced to serve eighteen months imprisonment on the first count and one year and one day imprisonment on the second count, sen-

tences to run concurrently (R. 13). On October 9, 1942, appellant served and filed his notice of appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 16-17).

Edgar L. Noble, the co-defendant, was engaged in the construction business with E. P. Hessee in Reno and Carson City, Nevada, in 1941 (R. 51). On October 30, 1941, Noble negotiated a contract to do remodeling work for Elizabeth E. Lund at 204 South Division Street in Carson City, Nevada (R. 38, 51). The contract price was One Thousand Dollars ($1,000.00), of which One Hundred Sixty-Seven Dollars ($167.00) was to be returned to Mrs. Lund (R. 39). The money for the contract price was obtained by negotiating a Federal Housing Administration loan (R. 43-44). Mrs. Lund received from E. P. Hessee part of the money borrowed on the F. H. A. loan in cash and spent it on the property herself (R. 58).

In June, 1942, Noble met appellant, John William Westenrider, in Reno, Nevada (R. 51). They discussed doing some roofing jobs together (R. 51). On June 12, 1942, they drove to Virginia City, Nevada, to see about the work. Noble explained to Westenrider how to handle F. H. A. jobs, and, among other things, explained that the F. H. A. loan could not exceed the contract price. He mentioned the Lund contract as an example of getting more money on the loan than was proper (R. 52). On the evening of Saturday, June 13, 1942, Noble and Westenrider drove from Virginia City, Nevada, to Carson City, Nevada. Enroute appellant, West-

enrider, suggested they see Mrs. Lund and make her give the money back and that Westenrider would be a special investigator. Noble agreed (R. 53, 55). They called on Mrs. Lund at 204 South Division Street in Carson City, Nevada, about 2:00 A. M., June 14, 1942. Noble pretended he had been arrested and was in Westenrider's custody (R. 36, 53). Westenrider told Mrs. Lund he was a government investigator (R. 36, 44) and suggested she had better straighten out the irregularities in her improvement loan to keep out of trouble (R. 37). Westenrider made a date to see her the next morning (R. 37). Noble and Westenrider visited Mrs. Lund again about noon the next day. Westenrider showed her the remodeling contract (Pl's. Ex. 1, R. 38-39) which stated that One Hundred Sixty-Seven Dollars ($167.00) would be returned. He also read her the criminal penalty from a warning notice on the regular F. H. A. Title I loan application form (Pl. Ex. 2, R. 41). Westenrider demanded One Hundred Sixty-Seven Dollars ($167.00) (R. 41, 44). Mrs. Lund gave him a check (Pl. Ex. #3, R. 42), for One Hundred Sixty-Seven Dollars ($167.00) drawn to the order of Edgar L. Noble, this in accordance with Westenrider's suggestion (R. 42). Westenrider and Noble then drove to Reno, Nevada, and cashed the check with F. M. Buchanan, dividing the money (R. 54, 50).

At the time of the foregoing events appellant, Westenrider, was not an investigator or inspector for the Federal Housing Administration, or in any manner connected with the F. H. A. (R. 56, 57).

Statutes Involved

Title 18, U. S.C. Sec. 76:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both. (Apr. 18, 1884, ch. 26, 23 Stat. 11; Mar. 4, 1909, ch. 321 § 32, 35 Stat. 1095; Feb. 28, 1938, ch. 37, 52 Stat. 83.)"

Title 18, U. S. C. Sec. 88:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (Mar. 4, 1909, ch. 321 § 37, 35 Stat. 1096.)"

Summary of the Argument

Appellant's motions for directed verdicts were properly denied. Elizabeth E. Lund was neither a principal in, nor an accomplice in the commission of the offenses alleged. She was the victim. Hence, the conviction does

not rest upon the uncorroborated testimony of an accomplice. The testimony of an accomplice is sufficient to sustain a conviction without corroboration.

The court did not err in overruling the objection to the question propounded Sheriff David Elkin, a witness. If error was committed, appellant was not prejudiced. The alleged error, not having been asserted as a ground for appeal in appellant's Notice of Appeal, is not properly raised. The alleged error is not properly presented because the Assignment of Error No. III does not quote the substance of the evidence admitted.

Argument

I.

The District Court correctly denied appellant's motions for a directed verdict of acquittal made on the ground that the evidence was insufficient to warrant a conviction.

Appellant's first and second assignments of error assert error in the court's orders overruling the motions for a directed verdict of acquittal made at the close of appellee's case (R. 7), and at the close of the entire case (R. 10). The grounds for the assertions of error are the same, that the evidence was insufficient because it consisted of the uncorroborated testimony of accomplices. The argument is based on the unfounded statement that Elizabeth E. Lund, a government witness, was a "principal" or "accomplice" in the commission of the offenses charged.

A "principal" is defined by Section 550, Title 18, U. S. C., as follows:

> "Whoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (Mar. 4, 1909, ch. 321, §332, 35 Stat. 1152)."

"An accomplice is 'one who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime.' *People v. Bolanger,* 71 Cal. 19, 11 Pac. 799; *State v. Roberts,* 15 Ore. 197, 13 Pac. 896. To render one an accomplice, 'he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction.' *People v. Smith,* 28 Hun. (N. Y.) 626." The foregoing quotation is from *Holmgren v. United* States (9CCA) 156 Fed. 439.

In *Diggs v. United States,* (9CCA) 220 Fed. 545, the court, discussing the meaning of the word "accomplice," cites with approval the following:

> "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried. 12 Cyc. 445. Where a penal statute is intended for the protection of a particular class of persons, one of that class does not become an accomplice by submitting to the injury. 1 McClain, Criminal Law, Sec. 199."

In the instant case, the government witness, Elizabeth E. Lund, was the victim of the criminal action of ap-

pellant. She was not an accomplice or principal. She did not aid, assist or participate in the commission of the offense. She could not have been indicted with appellant for the offense. She is one of the class of persons Section 76 of Title 18 U. S. C. is designed to protect, and she did not become an accomplice in the commission of the offense by submitting to appellant's extortionate demands.

Further, the rule is well settled in the federal courts that the uncorroborated testimony of accomplices is sufficient to warrant and sustain a conviction.

> *Lung v. United States* (9CCA) 218 Fed. 817,
> *Diggs v. United States* (9CCA) 220 Fed. 545,
> *Hass v. United States* (9CCA) 31 Fed. 2d. 13.

II.

The trial court did not err in overruling appellant's objection to the question asked Sheriff Elkin, a government witness, regarding the occupation and activities of appellant prior to the commission of the instant offense.

Appellant's third assignment of error alleges that prejudicial error was committed when the court overruled appellant's objection to a question propounded to David W. Elkin, a government witness (R. 47-49).

In the first place, the question was relevant and material. Appellant was charged with falsely impersonating a federal officer or employee. The falsity of this represented character was in issue. Defendant's occupation and activities prior to the commission of the

offense bear directly upon this issue. In this respect, the case differs from the ordinary criminal case where the occupation of defendant is not in issue.

Secondly, if the court's ruling was erroneous, defendant, nevertheless, was not prejudiced by the answer elicited (R. 49). There is nothing in the answer which reflects against the appellant, his character or reputation. Harmless error is no ground for reversal.

28 U. S. C. 391.

Thirdly, if error was committed, the point is not properly before this court, appellant having failed in his assignment of error(Assignment of Error No. III, R. 33) to quote the full substance of the evidence admitted. This is required by Rule 2(b), Criminal Appeals, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit (page 23).

In the fourth place, if error was committed, the point is not properly before this court, appellant having failed to include the alleged error as one of his grounds for appeal stated in his Notice of Appeal (R. 17).

See: *United Cigar Whelan Stores Corp. v. United States* (10 CCA) 113 F. 2d. 340.

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS O. CRAVEN,
United States Attorney.

BRUCE R. THOMPSON,
Ass't. United States Attorney.

WM. J. KANE,
Ass't. United States Attorney.